United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1378

To be argued by
SHEILA GINSBERG

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

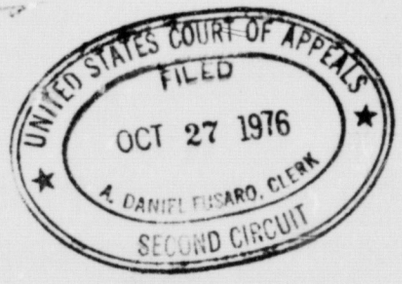
JACINTO NEGRON,

Defendant-Appellant.

Docket No. 76-1378

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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CONTENTS

TABLE OF CASES

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QUESTION PRESENTED

WHETHER JUDGE COSTANTINO'S DENIAL OF YOUNG ADULT OFFENDER TREATMENT WITHOUT A PROPER EXERCISE OF HIS DISCRETION REQUIRES REMAND FOR RESENTENCE.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) entered on March 18, 1976, denying appellant Negron's Rule 35 motion to vacate as illegally imposed his 10 year sentence for distribution of cocaine (21 U.S.C. §841(a)(1)).

This Court appointed The Legal Aid Society, Federal Defender Services Unit, to represent appellant on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

This is an appeal from Judge Costantino's denial of a Rule 35 motion[1] which requested, inter alia, that appellant's 10 year sentence be vacated as illegally imposed.

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[1]The order denying the motion is annexed as C to appellant's separate appendix.

A. Prior Proceedings

Appellant Jacinto Negron, and Mario Nunez, Ramon Restrepo, Enrique Lozano, Luis Toro, and Jane Doe, were charged in a three-count indictment[2] with conspiracy to distribute (Count One) and with the substantive possession (Count Two) and distribution (Count Three) of one kilogram of cocaine, in violation of 21 U.S.C. §§841(a)(1) and 846. On September 3, 1975,[3] appellant appeared before Judge Costantino and pleaded guilty to Count Three. Appellant, who was then 23 years old and a native of Colombia, spoke through an interpreter (Tr. dated 9/3/75 at 12[4]). He admitted his participation in the transaction, explaining that on May 2, 1975, he possessed the cocaine, intending to sell it (Tr. dated 9/3/75 at 7). Negron told the judge that he knew what he did was illegal and that was why he was pleading guilty (Tr. dated 9/3/75 at 4).

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[2]The indictment is B to appellant's separate appendix.

[3]The transcript of the plea proceeding has been docketed as part of the record on appeal.

[4]Numerals in parentheses preceded by a date refer to pages of the transcript of the proceeding on that date.

As a final matter, appellant sought to tell the judge that Restrepo and Rosano,[5] two of the other people charged in the indictment, were not, in fact, involved in the crime. According to appellant, Restrepo and "Rosano" had innocently agreed to drive appellant to the hotel where the sale was to take place[6] (Tr. dated 9/3/75 at 10-11).

On October 24, 1975, appellant appeared before Judge Costantino for sentence.[7] Counsel acknowledged that appellant had one prior New York State conviction, but asserted that Negron's role in this drug transaction was that of a carrier, or "mule," rather than a principal dealer (Tr. dated 10/24/75 at 5-6). After these brief remarks, counsel concluded by saying:

> Your Honor, other than that, I will not waste the Court's time.
>
> (Tr. dated 10/24/75 at 7).

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[5]This spelling appears to be an error in transcription since the indictment does not charge a Rosano, but rather Enrique Lozano.

[6]On January 30, 1976, on the motion of the Assistant United States Attorney, the indictment against Restrepo and Lozano was dismissed.

[7]The transcript of the sentencing proceeding (misdated October 24, 1976) is docketed as part of the record on appeal and is annexed as D to appellant's separate appendix.

When Judge Costantino asked appellant if he had anything to say, appellant, through an interpreter, replied:

> The only thing I want to do is to release the innocent ones and since we are guilty we might as well do whatever the Court desires.
>
> (Tr. dated 10/24/75 at 7).

The judge then sentenced appellant to a 10 year term of imprisonment, to be followed by a 15 year term of special parole[8] (Tr. dated 10/24/75 at 8). In response to the prosecutor's reminder that appellant claimed to be 23 years old, Judge Costantino said:

> The Court must now advise him in view of his involvement in the matter before the Court and the particular part that he took in that involvement, the Court denies him Y.C.A. treatment.
>
> (Tr. dated 10/24/75 at 8-8a).

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[8]The judge also directed that, upon completion of the term of imprisonment, appellant was to be deported (Tr. dated 10/24/75 at 8).

B. Present Proceeding

On February 9, 1976, appellant filed a pro se Rule 35 motion to vacate his sentence as illegally imposed.[9] Specifically, appellant argued, citing Yates v. United States, 356 U.S. 363, 366-367 (195), United States v. Daniels, 446 F.2d 967, 972 (6th Cir. 1971), and United States v. Williams, 407 F.2d 940, 945 (4th Cir. 1969), that Judge Costantino, in denying youthful offender treatment, had failed properly to exercise his discretion. On March 18, 1976, in a summary memorandum and order, Judge Costantino denied the motion.

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[9]The motion is annexed as E to appellant's separate appendix.

STATUTE INVOLVED

§ 4209. Young adult offenders

In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there is reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C. Chap. 402) sentence may be imposed pursuant to the provisions of such Act. Added Pub.L. 85-752, § 4, Aug. 25, 1958, 72 Stat. 846.

ARGUMENT

JUDGE COSTANTINO'S DENIAL OF YOUNG ADULT OFFENDER TREATMENT WITHOUT A PROPER EXERCISE OF HIS DISCRETION REQUIRES REMAND FOR RESENTENCE.

At the time of his sentence, appellant, who was 23 years old, was eligible, by virtue of his age, to "young adult offender" treatment. 18 U.S.C. §4209.[1] United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974). The judge, aware of appellant's eligibility, nonetheless, specifically denied application of this sentencing alternative because of appellant's involvement in a cocaine transaction.[2] This was fundamental error requiring reversal of the order denying appellant's Rule 35 motion and remand to the district court for resentence.

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[1]18 U.S.C. §4209 provides in pertinent part:

> . . .a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of his conviction . . .

[2]What Judge Costantino said was:

> . . .in view of his involvement in the matter before the court and the particular part that he took in that involvement, the court denies him Y.C.A.

Of course, the decision to apply the "young adult offender" alternative is within the discretion of the trial judge, but this court has held that Y.A.O. cannot be denied arbitrarily or without a proper exercise of that discretion. Dorszynski v. United States 418 U.S. 424, 443 (1974); United States v. Schwarz, supra, 500 F.2d at 1351-1352.

Section 4209 specifically provides that the criteria for eligibility under the statute are a defendant's previous record, his capabilities, and his mental and physical health. Limited consideration of only one criterion, like the prior criminal record, will not suffice. Stead v. United States, 531 F.2d 872 (8th Cir. 1976); United States v. Dinapoli, 519 F.2d 104, 107 (6th Cir. 1975). Nor is the nature or type of crime upon which conviction is had a bar to eligibility under §4209. United States v. Kaylor, 491 F.2d 1133, 1137 (2nd Cir. 1974) (en banc). This statute, unlike other provisions dealing with juveniles (18 U.S.C. §5032) or narcotics addicts (18 U.S.C. §4251(f)), contains no caveat preventing application to persons convicted of specified crimes.

Judge Costantino's denial of young adult offender treatment because of the nature of the crime involved violates Congressional intent to make §4209 available to persons who have committed serious offenses. See United States v. Schwarz, supra. Determination of the applicability of this sentencing alternative must be based on evaluations of a defendant's

susceptibility to treatment under the act. That was never done in this case. Nowhere in the record does Judge Costantino take cognizance of the fact that appellant pleaded guilty and fully admitted his participation in the crime. See United States v. Sidney Stein, Doc. No. 76-1299, slip op. 211, 229 (2nd Cir., October 22, 1976) (Lumbard, J., concurring).

Also ignored by the judge was appellant's admirable concern throughout the plea proceedings below to help persons he believed to be innocent. At no time did appellant seek to avoid punishment. Rather, he very responsibly acknowledged that he was prepared for incarceration.

On the record of this case, the trial judge's out-of- hand denial of a young adult offender sentence and the imposition of a straight 10 year period of incarceration on a 23 year old defendant was an abuse of discretion mandating vacatur of the sentence.

CONCLUSION

For the above-stated reasons, the case must be remanded for resentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Oct. 27, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Gordon